FORM NLRB-4479
(3-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RPS, INC.

Employer

and

TEAMSTERS LOCAL UNION NO.355, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

Case 5-RC-14905

DECISION AND ORDER

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1/]

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2/]

3. The labor organizations involved claim to represent certain employees of the Employer.[3/]

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6) (7)* of the Act for the following reasons:[4/]

SEE ATTACHED

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570. This request must be received by the Board in Washington by **August 17, 2000.**

Dated August 3, 2000

at Baltimore, Maryland

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Regional Director, Region 5

1/ At the hearing Petitioner moved to exclude as cumulative the presentation of additional driver/contractor witnesses and other evidence proffered by the Employer. The Hearing Officer granted the motion. The undersigned denied the Employer's request for special permission to appeal the Hearing Officer's ruling. By Order dated December 29, 1999, the Board affirmed the denial without prejudice to the Employer's raising the matter in a request for review of this decision.

2/ The parties stipulated that RPS, Inc., a Delaware corporation, (the Employer or RPS) is engaged in the business of small package pickup and delivery at its Bridgeville, Delaware facility (also know as the Salisbury terminal), the only facility involved in this matter. During the past twelve months, a representative period, RPS derived gross revenues in excess of $500,000 from the conduct of its business and during the same period provided services in excess of $10,000 directly to customers located outside the State of Delaware. While the hearing was in progress the Employer announced that RPS had changed its name to FedEx Ground Package System, Inc. The parties and witnesses then began referring to the Employer as "FedEx Ground" or variants on that name. The possibility of amending the Petition to reflect the name change was suggested by the Hearing Officer, but the Petition was not amended.

3/ The parties stipulated that Teamsters Local Union No. 355 a/w International Brotherhood of Teamsters, AFL-CIO (the Petitioner or Union) is a labor organization within the meaning of Section 2(5) of the Act.

4/ Petitioner seeks to represent a unit of all pickup and delivery (P & D) drivers/contractors and the swing driver/contractor employed by the Employer at its

Bridgeville, Maryland facility, excluding line haul drivers, temporary (temp) drivers A and B, package handlers, part-time employees, clerical employees, dispatchers, managers, guards and supervisors as defined in the Act. The Employer seeks to have the Petition dismissed on the grounds that its P & D drivers/contractors are not employees as defined in Section 2(3) of the Act, but rather are independent contractors. Alternatively, the Employer contends that they are supervisors within the meaning of Section 2(11) of the Act. In the event that the P & D drivers/contractors are found to be employees, the Employer maintains that the appropriate unit would also include any individual hired by a driver/contractor to be a driver, temporary A drivers, the line haul driver/contractor and any drivers hired by the line haul contractor. There are approximately 18 drivers/contractors in the unit sought by Petitioner. There is no history of collective bargaining.

During the hearing the parties stipulated that no particular legal significance would be given to the use of the term "driver" or "contractor" when used in connection with the individuals at issue. In this decision the term " driver/contractor" will generally be used.

Following the filing of the Petition on October 13, 1999, a hearing in this matter opened on October 28, 1999. It closed on February 23, 2000, following 48 days of record testimony and the submission of substantial documentary evidence. After the close of the hearing the Employer filed a motion to reopen the record to receive additional evidence in the form of affidavits. The unopposed motion was granted by the undersigned. Both parties filed briefs. Having considered the record and the submissions of the parties, I find that the P & D drivers/contractors and the swing driver/contractor are not employees within the meaning of the Act, but rather are independent contractors.

Background

The Board has addressed the employee status of Roadway Package Systems P & D drivers/contractors in three cases *Roadway Package Systems (Roadway I),* 288 NLRB 196 (1988); *Roadway Package Systems (Roadway II),* 292 NLRB 376 (1989), enfd. 902 F. 2d 34 (6th Cir. 1990); and most recently, *Roadway Package Systems (Roadway III),* 326 NLRB 842 (1998). In each case the P & D drivers/contractors were found to be employees rather than independent contractors. The Employer argues that it has made a number of significant changes in its relationship with its drivers/contractors, which has now resolved any question regarding the independent contractor relationship between the Employer and its drivers/contractors. The Petitioner contends that the relationship between the Employer and the drivers/contractors remains essentially the same as the employee relationship found by the Board in its three previous Roadway decisions.

In *Roadway III,* the Board noted that Roadway operated a nation-wide pickup and delivery system for small packages but that the sole issue before it was whether the drivers/contractors at Roadway's Ontario and Pomona, California terminals were employees under Section 2(3) of the Act or independent contractors not subject to the Board's jurisdiction. The Board initiated its discussion by pointing out that a decade before it had addressed the issue of the status of P & D drivers at Roadway's Louisville, Kentucky and Redford, Michigan terminals. There, the Board noted, these individuals were found to be employees who "bear few of the risks and enjoy little of the opportunities for gain associated with an entrepreneurial enterprise" and that Roadway had "substantial control over the manner and means" of their performance.

> *In Roadway I, Roadway controlled, inter alia, the customer service areas and the number of packages and stops that were assigned to the Louisville drivers. The drivers had no proprietary interest in their customer service areas, and their compensation was controlled by Roadway. Roadway also maintained a "core zone supplement rate" to balance the Louisville drivers' income across various zones and thus minimize their risk and opportunity for gain. In addition, Roadway had a "flex" program to allow for the temporary transfer of packages or areas among the Louisville drivers to equalize their workload. The drivers received no commission for any customer sales leads, but they were eligible for a startup loan of $650 in gross income per week for the first 13 weeks of delivery for Roadway. Most of the Louisville drivers purchased or leased their vehicles from a source sponsored by Roadway. On the termination of their service to Roadway, the drivers were simultaneously released from their financial obligations to that source. Finally, Roadway had significant control over the daily work schedule of the Louisville drivers, and it required that drivers wear a uniform and use the Roadway color and logo on their vehicles*. Roadway III, supra. at 843.

The Board in *Roadway III* stated that the facts presented in *Roadway II* closely resembled the *Roadway I* facts. It noted that the Board in *Roadway II* found employee status specifically quoting the conclusion that "entrepreneurial decisions affecting the drivers' profit-and-loss pictures are not made by the drivers, and that [Roadway] tells the drivers how to perform their work tasks well beyond the point of simply dictating the result." *Roadway III*, supra at 843, fn 10. Having discussed these previous findings the Board in *Roadway III* turned to Roadway's contention that in 1994 Roadway had made nationwide changes in its operations which would support a finding of independent contractor status. In particular the Board discussed Roadway's contention that it:

> *. . . no longer (1) requires a uniform starting time; (2) maintains a fleet of vehicles for its drivers' use; (3) maintains forms for the drivers to lease or purchase vehicles; (4) releases terminated drivers from their financial obligations; (5) terminates drivers' agreements at will and without cause; and (6) assigns customer service areas without giving the drivers a proprietary interest in these areas*. Roadway III, supra at 843.

After a detailed consideration of these contentions the *Roadway III* Board found no reason to change its *Roadway I* finding. The Board stated:

> *Roadway makes much of the fact that it has effectuated some changes in its relationship with the drivers since Roadway I. None of these changes require a finding of independent contractor status in these cases. While Roadway has created a proprietary interest and the right to sell service areas, the evidence falls short of demonstrating any real or tangible benefit from these new rights. In addition, Roadway's elaborate support programs continue to present drivers with minimal risks. Other indicators of entrepreneurship, such as performing outside work, business incorporation, use of additional drivers or helpers, or incentive-based income, continue to be absent.*
>
> *Roadway also continues as before to control the manner and means of performing deliveries and pickups. The daily regimen of drivers has not changed significantly. Other controls from the prior case remain the same, such as mandated uniforms, appearance standards, and vehicle specifications, logos, and color schemes. Roadway provides the source for equipment required by the agreement, albeit using third parties, under a system which it created and controls. Although there is no evidence of a discipline system, admonishment of drivers, a grievance procedure, or termination of drivers without cause, the elimination of these controls from the prior case does not outweigh the other strong factors indicating employee status. Similarly, as before, evidence that no benefits are received by drivers and that for tax purposes they are treated as independent contractors does not outweigh the various indicia of employee status. [footnotes omitted]*. Roadway III, supra at 853-854.

In reaching its determination the *Roadway III* Board applied the common-law agency test as interpreted by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), which is the same test applied herein. The Employer here does not quarrel with the Board's interpretation of the law of agency, but rather contends that the facts are sufficiently different from those found in *Roadway III* to sustain a finding of independent contractor status using this interpretation of the law of agency. While the Board's decision in *Roadway III* issued on August 1998, hearings in the two underlying representation proceedings were held in early 1995. The Employer points out that as of the representation

hearings in 1995, the 1994 changes had only been in effect a short time and that additionally much has changed since 1995. The Employer contends that in this record it has addressed many of the findings made by the Board in *Roadway III*, in particular by presenting evidence to "shore up" areas where the Board found insufficient evidence to support a finding of independent contractor status. Petitioner argues that no substantial changes have occurred which would warrant a departure from the Board's three prior findings of employee status for the P & D drivers.

The Facts

RPS currently has approximately 352 terminal facilities and 18 hub facilities in its package delivery systems. There are approximately 7,000 drivers/contractors including P & D and line haul. Additionally the Employer has at least 22,000 employees in a variety of positions from package handlers to office clericals, none of whom are at issue in this matter.

As more fully described below, P & D drivers/contractors are assigned to a terminal doing the local pickup and delivery of packages while line haul drivers/contractors generally handle over the road runs between hubs or hubs and terminals. P &D overflow, which cannot be handled by P& D drivers/contractors, usually because of seasonal or emergency conditions, is handled by temp drivers working for the Employer though paid through Pomerantz, a payroll service. Certain witnesses described two types of temps - temp A's being individuals who have shown an interest in or potential to be a driver/contractor; while temp B's are variously described as individuals who do not want to be a driver/contractor, who have other regular jobs, or who do not have the financial background or credit history to

qualify as a driver/contractor. Other witnesses, including many former temps, have never heard of the distinction.

In addition to the temp A's and temp B's hired by RPS there are the drivers and helpers "hired" by drivers/contractors on either a temporary or full time basis. Many of the drivers hired by drivers/contractors have previously been employed by the Employer through Pomerantz or, in some cases, alternate working as temps for RPS and for various drivers/contractors. Similarly, a substantial number of the helpers employed by drivers/contractors also regularly work as package handlers employed by RPS on the night shift. Not all drivers and helpers employed by drivers/contractors also work for RPS. Many drivers/contractors use friends or relatives as drivers and helpers or recruit through newspaper advertisements.

The relationships between the drivers/contractors and their "employees" and the involvement of RPS in these relationships varies widely from terminal to terminal and within terminals. Pay and benefit arrangements are also varied. "Employees" of drivers/contractors may work part-time or full-time and be considered temporary, permanent or seasonal. Some are treated as employees for tax purposes, some as independent contractors, and many strictly as casuals.

The Bridgeville, Delaware (Salisbury) terminal currently has 18 P & D service areas plus the swing or vacation relief contract. Servicing these areas are approximately 17 P & D drivers/contractors including two drivers/contractors who are under contract for two service areas each with the second areas requiring additional drivers. Tom Spence's second area is driven by his brother Richard (Rick) Spence and Travis Boardman's second area is driven by

Matt West. Most of the P &D drivers/contractors use temporary drivers and helpers on some occasions, as further detailed below. The one line haul contractor, Alan Loudon, who usually does not drive for the Employer himself, utilizes four tractors and five drivers, four of them full time. There are about 20 package handlers, also referred to as loaders or preloaders, employed by the Employer at Bridgeville.

At any one time there are also approximately seven to ten temps employed by the Employer at Bridgeville. While an RPS official testified that temps learning to become contractors are temp A's and temps for temporary income are temp B's, there was no evidence that at Bridgeville temps were actually so classified. No payroll records showing such classifications at Bridgeville were presented. Bridgeville Terminal Manager Robert Stone testified that he had never classified temps as A's or B's. He did however describe certain temps as A's and other as B's. Thus it appears that, at least at Bridgeville, "temp A" and "temp B" are descriptive terms rather than actual job classifications.

The management hierarchy at Bridgeville, in addition to Terminal Manager Stone, are Mark Longo, the P & D coordinator, as well as the "2 a.m." and "2 p.m." P & D coordinators, all stipulated by the parties to be supervisors within the meaning of Section 2(11) of the Act. The terminal also has a quality assurance (QA) clerk, a part-time data entry clerk, and an account representative. There is no dispute that the package handlers and clericals should be excluded from any unit found appropriate.

The Petitioner seeks to represent only the P & D and swing drivers/contractors at Bridgeville and would not include in the unit the line haul contractor or his drivers, temp drivers A or B, drivers employed by drivers/contractors or helpers. The Employer takes the

position that all drivers/contractors at Bridgeville--whether P & D, swing or line haul--are independent contractors. Its secondary position is that the drivers/contractors are supervisors within the meaning of the Act. The Employer's fall back position, (if it fails in its positions that drivers/contractors are either independent contractors or supervisors) is that a Bridgeville unit should include the drivers employed by the P & D drivers/contractors and line haul drivers/contractors as well as temp A drivers. According to the Employer, temp B drivers at Bridgeville should be excluded as casuals in all scenarios. The Employer's position on helpers under its alternate positions is not clear.

The P & D drivers/contractors at the Bridgeville terminal pickup and deliver small packages on the Eastern Shore of Maryland and in Delaware. Bridgeville also has a swing driver/contractor who acts as a vacation relief driver for P & D drivers/contractors electing to participate in an optional vacation relief program. Packages for delivery arrive at Bridgeville from the Harrisburg, Pennsylvania hub in trailers pulled by the line hauler's tractors. During the night and early morning the package handlers unload the packages from the trailers onto a conveyor belt. Packages are then sorted and loaded on to delivery trucks.

At Bridgeville package handlers load delivery trucks that have been left at the terminal overnight. Loading of a truck that has not been left at the terminal overnight is the responsibility of the driver/contractor. Drivers/contractors also occasionally assist package handlers with loading at Bridgeville. At some terminals in the Employer's system there are no package handlers and drivers/contractors receive additional payment for loading. At Bridgeville there is no additional payment if the driver/contractor chooses not to have the

package handlers do the loading. Most drivers/contractors, however, do some rearranging of the packages even if they do not load them.

After loading is complete, drivers/contractors pick up pouches containing their paperwork and their scanners, part of the computerized package tracking system and proceed to their service areas and begin delivering packages. As each package is delivered they scan its bar code and, in the case of commercial customers obtain a signature receipt, which is not required for deliveries to residential customers. Occasionally funds are collected for COD packages. The same drivers/contractors also pickup packages in their service area based on a variety of arrangements made in advance with shipping customers. After completing his last stop, the driver/contractor transmits information gathered by his scanner through an onboard computer. The information gathered by the computer is printed out at the terminal. Once back at the terminal the driver/contractor reviews the printout and records his hours and mileage. He turns in with the scanner, COD funds and other paperwork. Undelivered packages are accounted for and returned into the system.

Drivers/contractors are paid on a complex system based on a variety of factors including number of packages, number of stops and mileage compiled from the printouts, mileage reports and other paperwork. A daily settlement record is completed by each driver/contractor which basically acts as a bill for services to the Employer.

The goal of the Employer is to deliver every package the day that it arrives at the terminal, or at least 99% of them. Tremendous flexibility in the system is required because of the ever changing number and geographical configuration of pickups and deliveries which are in the end dictated by the customers. In an effort to achieve flexibility there are a myriad

of exceptions to one driver/contractor, one truck, one service area, one settlement model. In some cases the P & D work is performed by temp drivers hired by the Employer, by managers of the Employer, and by temps or permanent drivers hired or contracted for by drivers/contractors. Frequently vehicles are rented on a temporary basis by the Employers and by the drivers/contractors to cover breakdowns or act as a supplement. Sometimes helpers are used to run packages or perform any number of duties other than driving.

Drivers/contractors frequently pickup and deliver packages outside of their service areas, a practice known as flexing. In certain instances involving large volume customers, a whole trailer, known as a "spotted" trailer, is dropped off at a customer for loading and or unloading and is later picked up. Some drivers/contractors who cannot service their area with one truck pull a trailer behind their truck. Others arrange for another driver to drive a second or "supplemental" truck. Many drivers/contractors have more than one service area, as do two at Bridgeville, requiring additional trucks and additional drivers hired or contracted for by the driver/contractor. There are P & D drivers/contractors know as "absentee" contractors who drive only on an emergency or relief basis using other drivers for their service area such as John Haney at Bridgeville.

The business of pickup and delivery requires a daily dance at each terminal, part art and part science, to get something approximating a reasonable number of packages on a reasonable number of trucks, to comply with the "one day" commitment, operate within government regulations, satisfy customers and make a profit. This Employer seeks to shift some of the uncertainties of the business, along with the possibilities of profit and loss to the

drivers/contractors. The shift in this burden is handled with certain differences from terminal to terminal based on local conditions and personnel.

Most terminals appear to be subject to both continuing growth in customer base and some type of seasonal fluctuation related to the Christmas season. Bridgeville, which is located near large summer beach vacation communities, is also subject to a substantial increase in volume during summer vacation time. Also complicating the Bridgeville situation, (though not particularly unusual in the nation wide system), are the numbers of isolated rural areas serviced by the terminal, including some islands. Surrounded by rural areas, Bridgeville also suffers from a lack of qualified drivers. In recent years the Bridgeville terminal has fallen below the 99% package delivery goal and even below 97%, the level which is deemed a serious problem by the Employer requiring remedial action. One type of remedial action is service area reconfiguration which has occurred with some frequency at Bridgeville.

The practices and procedures at the Bridgeville terminal appeared to differ from some of the Employer's standards in certain instances, mainly due to some of its particular problems, but the record as a whole established that the Bridgeville terminal operated as a part of an integral system and generally operated as did other Employer terminals.

The P & D drivers/contractors at Bridgeville, as throughout the system, are all signatories to a PICK-UP AND DELIVERY CONTRACTOR OPERATING AGREEMENT (the Agreement) with the Employer. Line haul driver/contractor Loudon is signatory to a line haul operating agreement, which is similar to the Agreement, as well as a standard P & D addendum which allows line haulers to provide P & D services. The operating agreements

between the drivers/contractors and the Employer, and a variety of addendums, detail the arrangements regarding the services to be performed and the amount of compensation. While there have been occasional minor changes in the basic P & D Agreement, the last major revision to the Agreement occurred in 1994.

The Agreement opens with the following:

> *BACKGROUND STATEMENT. RPS, Inc. is a duly licensed motor carrier engaged in providing a small package information, transportation and delivery service throughout the United States, with connecting international service. The Contractor is an owner-operator of one or more pieces of trucking equipment suitable for use in such a service. Contractor wants to make this equipment available, together with a qualified operator for each piece of equipment, to provide daily pick-up and delivery service on behalf of RPS. RPS wants to provide for package pick-up and delivery services through a network of independent contractors, and, subject to the number of packages tendered to RPS for shipment, will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment. Contractor wants the advantage of operating within a system that will provide access to national accounts and the benefit of added revenues associated with shipments picked up and delivered by other contractors throughout the RPS system. In order to get that advantage, Contractor is willing to commit to provide daily pick-up and delivery service, and to conduct his/her business so that it can be identified as part of the RPS system. Both RPS and Contractor intend that Contractor will provide these services strictly as an independent contractor, and not as an employee of RPS for any purpose. Therefore, this agreement will set forth the mutual business objectives of the two parties intended to be served by this Agreement – which are the results the Contractor agrees to seek to achieve – but the manner and means of reaching these results are within the discretion of the Contractor, and no officer or employee of RPS shall have the authority to impose any term or condition on the Contractor or on the Contractor's continued operation which is contrary to this understanding*.

The basic P & D operating Agreement is a standard agreement prepared by the Employer. Drivers/contractors cannot negotiate changes to the basic Agreement language. Through addendums, however, the Agreement does provide for a number of elections and individual arrangements. The specifics of the addendums generally appear to be negotiable.

Drivers/contractors regularly execute addendums to their agreements changing their service area, an election or other arrangements. Federal regulations require that vehicles not owned by the carrier company be operated pursuant to a written lease. Thus the agreements are drafted to serve as equipment leases in addition to operating agreements.

Section 1, *EQUIPMENT AND OPERATION*, 1.1, *Power Equipment*, first references an addendum which describes in detail the particular equipment leased to the Employer. Section 1.1 then provides that the equipment meets all applicable government regulations. It states further that the selection and replacement of the equipment is within the contractor's discretion "subject to the determination" of the Employer of its "suitability for the service called for in this Agreement." Size is not a specification per se as the size of vehicle needed depends on the route being serviced. Suitability, according to an RPS official, means a vehicle that can handle small packages and meets DOT requirements. A stepvan, for example, would not be suitable for doing "spots" when the customer needs a 28 foot trailer, while a tractor trailer would not be suitable for congested residential neighborhood.

Drivers/contractors acquire their equipment from a number of different sources. Many buy used equipment, frequently from other drivers/contractors. Lease-purchase arrangements are very common. Quite often a driver/contractor will take over the lease-purchase agreement of the driver/contractor whose route he is purchasing. Other drivers/contractors buy new, even custom-made equipment from various manufacturers. The driver/contractor is responsible for any financing which typically comes from banks, family or individual owners selling the equipment. Some buy from Navistar, a manufacturer which has a financing program.

The most common source of lease or lease-purchase vehicles is Bush Leasing. RPS has no financial interest in Bush Leasing, but has a close business relationship with Bush. RPS orders trucks to be built to its specification by manufacturers Freightliner, Navistar, Chevrolet and Ford. RPS, in the words of one of its officials, then acts as a "dealership." If a driver/contractor selects one of these vehicles, RPS sells it to Bush for leasing or lease-purchase to the driver/contractor. As of the end of September 1999, Bush Leasing had 3,100 leases with P & D drivers/contractors of RPS. Drivers/contractors also lease from Cook, Associates Commercial Leasing, LJL, Capital Resource Group and All-Tec.

Drivers/contractors who are selling their routes frequently sell their vehicles to the route purchaser. In many cases where the seller has had a lease-purchase agreement with Bush the purchaser takes over the payments. There is no evidence that Bush releases drivers/contractors from their leases when they terminate their contracts with RPS. Rather it appears that if a vehicle is not paid off or sold and a driver/contractor "walks away" from his commitment, Bush will repossess the vehicle. The repossessed vehicles are frequently bought by other drivers/contractors. Bush will also purchase vehicles for resale. One driver/contractor reported that he had paid $5,000 for his truck and later sold it to Bush for $6,000.

The cost of vehicles and equipment differs by size and various other factors. A brand new P-1000, a popular size delivery van, was estimated to cost approximately $38,500. Smaller vehicles can be used on some routes and cost less. Non-van type vehicles are also used. One driver/contractor reported buying a new 24 foot straight truck from Cornhuster Trucks for $33,500. Used vehicles are frequently bought and sold with prices varying

depending on size, age, use and other factors. In many cases drivers/contractors acquire vehicles and equipment along with a route they purchase for one inclusive price. Prices usually decline with vehicle age. In addition to trucks and vans, other equipment such as trailers must be purchased. One driver/contractor, for example, paid $6,000 for an 18 foot cargo trailer.

Under Section 1.2, *Equipment Maintenance,* of the Agreement, the driver/contractor agrees to maintain the equipment in accordance with various government regulations and that absent specific regulation, the manufacturer's maintenance schedule will be deemed to meet the regulations. The section requires that "proof of timely maintenance" be provided to the Employer. Some drivers/contractors perform some or all of their equipment maintenance, but most take their equipment to local dealers or service companies. Independent mechanics have made arrangements to come to some terminals to perform maintenance and repairs. At Bridgeville, driver/contractor Michael Jackson had a side business of performing maintenance and repairs for fellow drivers/contractors in 1995 and 1996. Working at his garage on Saturdays he charged $35 for basic preventive maintenance while the owners supplied the materials.

Further under this section, if the equipment is defective the contractor must, at his expense, provide suitable alternative equipment. Generally this means that when a truck is out of service for repairs the driver/contractor rents a replacement, usually from a national concern such as Ryder. At Bridgeville, the Employer has made arrangements with Bush to have two rental trucks parked at the terminal with Bush only charging when these trucks are

actually used. The Employer then pays Bush the rental fee and deducts the amount from the driver/contractor's settlement.

By Section 1.3, *Operating Expenses,* of the Agreement, the driver/contractor agrees to bear all equipment costs and expenses including maintenance, fuel, taxes, depreciation and even bridge tolls. The breakdown of major truck components such as engines and transmissions with their high costs were pointed to by many drivers/contractors as one of their greatest risks.

Under Section 1.4, *Operation of the Equipment,* of the Agreement, the driver/contractor agrees to operate the equipment and to determine "the methods, manner and means" of performing the contract obligations. RPS, however, is considered to have "exclusive possession, use and control" of the equipment for purposes of ICC and other applicable regulations, but has no right to operate the equipment without express permission of the owner except for movement around the yard. This section also holds RPS harmless for any liability if the equipment is used for non-RPS purposes including any separate business of the contractor.

Federal Motor Carrier Safety Regulations require equipment be identified with the carrier's name and DOT number. Section 1.5, *Equipment Identification While in RPS's Service*, of the Agreement, provides that the equipment will be marked with RPS colors, logos, insignia, etc., while in RPS service. Trucks used in the Employer's service are painted cream or white with its logo on both sides and DOT numbering.

Section 1.5 specifically provides that the equipment "may be used for other commercial or personal purposes," but when not in RPS service these logos, insignia, etc.

must be removed or covered during such use. Throughout the system driver/contractor's equipment under lease to RPS is used for a great variety of personal and outside commercial purposes. Moving furniture for self and friends were most commonly testified to, followed by mulch hauling. On the commercial side, weekend appliance and furniture delivery seems common, but other uses included delivering horse semen, floral arrangements, mortuary equipment, and even selling crabs. Some drivers/contractors covered their RPS insignia and logos during non-RPS use, while many admitted that they did not.

In its brief the Employer points to 29 separate contractors/drivers who testified to non-RPS commercial use of their RPS equipment. Petitioner in its brief admits that of the contractors who testified there was an even split between those who made outside commercial use of their vehicles and those who did not. Notably at Bridgeville there was no evidence of outside commercial use.

Section 1.6, *Licensing*, of the Agreement, requires the contractor to comply with state registration and licensing regulations. Section 1.7, *Logs and Reports,* of the Agreement, requires contractors to prepare logs and inspection reports required by law and to file the originals with RPS. Under Section 1.8, *Shipping Documents and Collections,* of the Agreement, contractors agree to prepare various shipping documents and to collect and return "collect" charges.

A $1,000 deposit is required of all contractors under Section 1.9, *Contractor Performance Escrow Account,* of the Agreement. Interest is paid on the deposit. The escrow account functions like a security deposit and the deposit is returned upon fulfillment of contractor obligation following termination of the contract. It is used to pay off any

contractor debts to the Employer and it is forfeited, apparently with some frequency, by drivers/contractors who "walk away" without giving notice.

Section 1.10, *Agreed Standard of Service*, of the Agreement, is quite detailed including such requirements as theft avoidance practices, complying with laws, and conducting business with integrity, honesty and proper decorum. Of particular note is subsection (a) which requires daily pickup and deliveries in the primary service area, but adds parenthetically that on any day where the volume of packages for the service area exceeds the volume that "contractor can reasonably be expected to handle" a portion of the packages may be reassigned. Some drivers/contractors testified to adding helpers and additional equipment so as to be able to handle all the packages for their area, whatever the volume. Other drivers/contractors were unwilling or unable to make such additional arrangements. At Bridgeville drivers/contractors testified to the difficulty in finding qualified drivers for supplemental equipment in their area. Furthermore, the large seasonal fluctuations made the purchase of supplemental equipment for excess volume less attractive to drivers/contractors at Bridgeville than at many other terminals. Thus at Bridgeville the arrangements for package volume that a contractor could not reasonably be expected to handle falls frequently to terminal management. The interpretation of what is "reasonable" is of course subject to wide variation. However, rather than looking to the language of this section when questions of excess volume arose, many drivers/contractors at Bridgeville testified that it was their participation in flex program, described below, which required the Employer to relieve them of unreasonable volume. This turns out to be a misunderstanding,

though some witnesses testified the misunderstanding may have been fostered by the Employer for the purpose of inducing participation in the flex program.

In any case it is clear that the Employer regularly and continually shifts pickup and delivery assignments in response to volume changes. In some cases terminal management is able to discuss reassignments in advance with the drivers/contractors involved, but in most cases the decisions are made during the middle of the night. It turns out that it is easiest for terminal management to shift large volume stops on major highways to temps, who, being less experienced, would have some difficulty finding many individuals stops on side or rural roads. While there was some disagreement on the point, most drivers/contractors were of the opinion that what was being reassigned were the easiest and most lucrative stops.

Section 1.11, *Refused or Returned Shipments,* of the Agreement, provides that packages which the driver/contractor cannot deliver or which are refused must be returned to the terminal that day with electronic or manual documentation. When delivering to commercial customers the Employer requires that drivers/contractors secure a signature at the time of delivery. This requirement does not apply to residential customers and drivers/contractors are encouraged to leave packages without securing a signature where it appears safe to do so if the customer is not at home. Because drivers/contractors can be held liable for missing packages a certain amount of disagreement can develop with terminal management when drivers/contractors return with residential packages in cases where the customer was not at home. More problematic are packages which the driver/contractor does not attempt to deliver. These "did not attempts" occur when the driver/contractor arrives at a commercial customer after the receiving area has closed, runs out of time under DOT

regulations, has a breakdown, or comes in early for personal or other reasons. Management personnel frequently question drivers/contractors vigorously about "did not attempts," in management's view the questioning is an attempt to help rectify the situation, though not necessarily viewed in those terms by the drivers/contractors. In other cases the drivers/contractors are chastised or even threatened with contract termination when packages are repeatedly returned. Drivers/contractors attribute "did not attempts" to having been "over dispatched," meaning that they started out with an unreasonable volume, some of which should have been reassigned, or that customers had unreasonable or conflicting pickup and delivery time requirements or that geographical customer distribution made delivery impossible even if package volume was not particularly high. At Bridgeville, as noted above, there have been a high number of packages not delivered the first day. Repeated service area reconfigurations, discussed below, have been made.

Of substantial concern to the Employer is its "image." At section 1.12, *Operator and Equipment Appearance Standard,* of the Agreement, it is acknowledged by the driver/contractor that "presentation of a consistent image . . . is essential in order to be competitive . . . and to permit recognition and prompt access to customers' places of business." It requires that all persons having contact with the public, which would include drivers/contractors and anyone driving for or assisting them, wear approved uniforms and have a personal appearance "consistent with reasonable standards of good order as maintained by competitors and promulgated from time to time by RPS." Drivers/contractors can subscribe to a uniform service or purchase uniforms through an approved manufacturer, though required pants, shoes and socks can be purchased from most retail dealers. The

personal appearance requirements generally appear to be limited to no visible tattoos, earrings or excessively long hair. The section also requires that the trucks and other equipment be clean and free from body damage and extraneous markings.

Section 1.13, *Communications Equipment,* of the Agreement, requires the purchase or lease of necessary electronic equipment. Currently the only equipment needed is the scanner and an on-board computer in which the scanner is inserted. While there is the theoretical possibility that the equipment can be purchased outright, there appears to be no ready market for its sale and no service available on purchased equipment. Drivers/contractors invariably secure the equipment through the Employer's "Business Support Package" described below. Many drivers/contractors carry cell phones and/or pagers, but these are not required or even particularly encouraged by the Employer.

The Employer obligates the drivers/contractors to fully train all persons who operate their equipment under Section 1.14, *Contractor's Obligation to Meet Standards of Customer Service,* of the Agreement. Thus drivers/contractors are responsible for training anyone who drives for them. Complaints ranging from discourtesy to major accidents, about drivers operating equipment, are made to the driver/contractor of that particular service area. The drivers/contractors are held responsible by the Employer, for themselves and anyone authorized by them to use the equipment.

Also under this section the terminal personnel are permitted to visit customers with the drivers/contractors four times a year to verify service standards. Generally coordinators or other Employer managers "ride along" with drivers/contractors once or twice a year, trying to pick a typical day for the ride. The rides may result in a few suggestions to the

driver/contractor (such as alternates routes or package handling procedures) who may, and apparently usually do, choose to ignore any or all of them. This is consistent with the following section, 1.15, *Discretion to Determine Method and Means of Meeting Business Objectives,* of the Agreement. The Employer continually stressed that it had no authority to prescribe hours or work, breaks, routes or details of performance as is specified in the section. The section also specifies that the contractor "shall be responsible for exercising independent discretion and judgment to achieve the business objectives . . ." and that the Employer shall have no authority as to the "manner and means" employed to obtain objectives and results.

While the Employer does not prescribe the drivers/contractors hours directly, there are many time restrictions. The first limitation is the completion of loading, unless of course the driver/contractor decides to leave before loading is complete and to come back to the terminal later for the rest of his packages. Many customers impose restrictions on time for pickups and deliveries. DOT regulations restrict work to 12 hours a day or 60 hours a week. Drivers/contractors who complete package pickup and deliveries for their service area may be assigned additional packages under the "flex program" or due to "service area reconfiguration" discussed below. While many drivers/contractors testified that they ran personal errands, drove golf balls, or picked up their kids from school during the work day, more testified to long work days and being chastised by managers if they came in "early" with undelivered packages. Some drivers/contractors went home for lunch, but more testified to missing lunch or eating on route.

The number of options to run a given route are limited. Roads and geography impose the greatest limitation followed by customer pickup and delivery requirements. When the Employer hires temps to deliver overflow they are generally sent to a few large customers on major highways where route selection is not a major question. How a route is driven by drivers/contractors is not dictated by the Employer nor are they encouraged to drive the routes in a particular order or to use specific roads. Determining how to service their area is clearly a problem the Employer, which is not paying for the fuel and not paying the drivers/contractors by the hour, has left to the devices of the drivers/contractors to solve.

Under Section 2, *VEHICLE OPERATIONS*, 2.1, *Additional Vehicles: Safe Operation Required*, of the Agreement, the drivers/contractors "with the consent" of the Employer may operate more than one vehicle. The additional vehicles must be driven by "qualified operators employed by Contractor." The section then references *Safe Driving Standards* appended to the agreement. The appendix begins with a preface, *RPS SAFE DRIVING PROGRAM*, which explains that the Employer maintains a "self-coverage" insurance program for public liability and property damage. For drivers who maintain the standards of the program it is cost free. On the other hand, disqualified drivers/contractors must find substitute insurance coverage. The appendix then lists 19 *Driver Eligibility Requirements*, plus sub-parts. These detailed requirements cover driving experience, licenses, accident record, criminal record and other related topics. The Employer developed these standards bearing in mind the DOT minimum standards and requirements. In most respects the Employer's standards are a restatement of DOT standards, but in some cases they exceed the DOT standard. For example, the Employer's safe driving program is stricter because it

prohibits drivers from having any felonies where DOT generally prohibits drivers with felonies related to commercial motor vehicles. The Employer's rule allowing no record of positive drug or alcohol test is also stricter than DOT's rule.

The *Driver Eligibility Requirements* section of the attachment is followed by a *Driver Safety Standards* section. This section details 25 prohibited acts or omissions by a driver/contractor which relate to accidents or unsafe driving. "Carrying passengers not authorized by RPS while on RPS's business" is prohibited. Failure to fully cooperate in any legal action including "attendance at hearings, trials, meetings, etc" is also prohibited The *Driver Eligibility Requirements* and *Driver Safety Standards* overlap in many respects, but they are not co-extensive. Safety standard violations can cause a driver/contractor to be disqualified from the free insurance program. For example, a driver/contractor may be deemed ineligible for causing two or more at fault accidents within a twelve month period. As previously stated, the driver/contractor would have to get his own insurance, but he could still drive. On the other hand, non-compliance with a driver eligibility requirement completely disqualifies an individual from driving in the Employer's system. At Bridgeville, for example, a driver/contractor was precluded by the Employer from using an individual to drive for him who did not meet the requirement that a driver be at least 21 years old. This minimum age requirement like most of the Employer's *Driver Eligibility Requirements,* is directly based on a DOT Federal Motor Carrier Safety regulation.

Also the body of the Agreement at Section 2.2 , *Employment of Qualified Persons*, states that all persons employed by the driver/contractor must be qualified under various applicable government safety standards. This section also requires the driver/contractor to

train the employee and bear all expenses associated with qualifying the person. Training and qualification expenses are rather limited, though in some cases drivers/contractors have paid for driving school for their drivers. In most cases the Employer does the background checks, apparently at the Employer's expense.

Section 2.2 also specifically requires that the driver/contractor "bear all expenses associated with the employment of such persons, including without limitation, wages, salaries, employment taxes, workers compensation coverage, health care, retirement benefits and insurance coverage." While $400-$500 a week or $80 to $100 a day salary for drivers working for drivers/contractors are common, pay and benefit practices vary widely throughout the system. Some drivers/contractors pay their drivers based on a percentage of their settlement or have some type of incentive program. Some provide a wide array of benefits, other provide none. Some treat their drivers as independent contractors for tax purposes, while others treat them as employees. The Employer insists that it does not determine what temps are paid by drivers/contractors though some drivers/contractors at Bridgeville testified that the rate is set by the Employer. At Bridgeville temps employed by drivers/contractors are usually paid the same rate as the rate paid by the terminal or a few dollars more. The Employer has in effect established the market price if not dictated it. Drivers employed on a more permanent basis have more varied arrangements. Helpers for the most part are treated as casuals. Helper pay of $40 per day is not uncommon, while pay of only a few dollars plus lunch for a few hours work or using an unpaid friend or relative on occasion was also reported. There was no evidence that the Employer ever pays employees

or contractors of its drivers/contractors. Nor does it provide them with any benefits or have any involvement with tax reporting on their income.

At Bridgeville, Jason Robert Coco drove a second route for driver/contractor Michael Jackson for six months at $80 per day. He then bought the route from Jackson in 1998. The following summer Coco ran a supplemental route using a Ryder rental truck and hired Jackie Goff to drive at $80 per day. In 1996, Jackson had hired John Haney as driver for his second van paying him $400 for a 50 hour week. After four months Haney purchased a route from driver/contractor Glenn Williams. Currently Haney employs Goff to do his route while he stays home to care for his daughter. Goff is paid by Haney a base wage of $450 with a sliding scale based on her stop count. Haney, who has a degree in accounting, explained that when he worked for Jackson, Jackson issued him a 1099 form and made him responsible for his own Social Security and Medicare. Haney, on the other hand, will issue Goff a W2 form, withhold taxes and pay Social Security.

Thomas Spence is one of two Bridgeville drivers/contractors with two contracted routes each under a separate agreement. One of the routes is driven by his brother Rick Spence who wanted to have the agreement in his own name, but RPS has a policy against relatives having agreements. Thus Thomas Spence contracted the route for his brother and pays him the full proceeds of the second route. Rick Spence in turn has a part-time helper, Andre Murry, though the record is not clear how or what Murry is paid.

Travis Boardman also has a second contracted area. It is driven by Matt West who Boardman pays $400 per week plus up to $50 in incentive pay. When Boardman takes time off from driving his first route he hires former RPS driver Dave Miller at $500 per week. He

also uses loader Jim Dove as a part-time helper. Boardman pays Dove from $40 to $50 per day if he does under 70 stops and from $50 to $60 for 70 to 80 stops per day and $70 if he does 100 stops per day.

Section 3, *INSURANCE AND INDEMNITIES*, of the Agreement, includes provisions regarding a number of different types of insurance. The "self-coverage" insurance program for public liability and property damage discussed above only applies while packages are onboard the truck. Section 3.1, *Non trucking Liability Coverage-Contractor Responsibility*, of the Agreement, requires drivers/contractors to purchase public liability and property damage coverage for times when the truck is operated without packages on board such as when the truck is returning to the terminal empty. Types and minimum coverage are listed in the section and in an addendum to the agreement. Arrangements for this coverage can be made through the Employer or on the open market.

Section 3.2, *Public Liability--RPS's Responsibility*, of the Agreement, reiterates the Employer's self coverage on liability, lists exceptions to the coverage such as driver misconduct and the Employer's election to discontinue the coverage. Section 3.3, *Public Liability—Contractor Responsibility*, provides that the Employer "in its sole discretion" may determine that its Safe Driving Standards have not been met and discontinue coverage. The coverage that the contractor must obtain in this circumstance is detailed. Drivers/contractors who the Employer unilaterally decides do not meet its standards have no choice but to go to the open market for coverage demanded by the Employer.

Section 3.4, *RPS's Non-Liability for Equipment*, of the Agreement, exempts the Employer from all liability except that caused by the Employer. It also exempts the

Employer from liability for depreciation. Section 3.5, *Contractor's Responsibility for Certain Losses*, of the Agreement, has a number of provisions, which in effect create various deductibles for various types of losses including losses due to accidents, package damage or losses, and a variety of other types of losses under its "self-coverage." The accident loss deductible is on a sliding scale based on the driver/contractor's accident record. Significantly, a driver/contractor can be held liable for up to $1,000 on the loss of each package. This provision sometime creates a difficult decision for the driver/contractor who must determine whether it is sufficiently safe to leave a package without obtaining a signature when a non-commercial customer is not at home, or to incur the time and expense of returning to the customer's home a second or third time in hopes of finding the customer at home. As noted above, commercial deliveries always require signatures in the Employer's system.

Workers compensation laws differ by state including their mandatory or optional applicability to independent contractors. By section 3.6, *Work Accident and Workers Compensation*, of the Agreement, the Employer requires the driver/contractor to obtain either work accident or workers compensations insurance. Under the agreement, in states where the coverage is not required by law it is mandated by the Employer. Minimums are specified in the section and in an addendum. It provides the option of obtaining the insurance though coverage negotiated by the Employer which differs by state.

Section 4, *SETTLEMENT WITH CONTRACTOR*, of the Agreement, details how drivers/contractors are paid. Section 4.1, *Settlement for Services Performed*, of the Agreement, provides for weekly settlement and describes the components of the settlement.

The average annual gross settlement for a service area was estimated at $64,000 while the gross revenues for individual drivers/contractors, some of whom operate multiple equipment, was estimated to range from $45,000 to $865,000. Net figures are of course considerably less. An addendum to the Agreement with attachments individualized for each driver/contractor detail the amounts of various payments.

The settlement is divided into five basic parts. The first, "Package Pick-Up and Delivery Settlement" is the amount paid for stops and packages handled. The pay for a stop, either package pickup or deliveries is $1.00. In addition, 22 cents is paid for each package delivered by regular delivery trucks, referred to as vans, with a higher rate for tractor-trailer deliveries. The rate for each package picked up by van is on a sliding scale beginning at 13 cents and ranging downward depending on volume. Tractor-trailer pickups are on a slightly different scale. The size or weight of the package is irrelevant to payment unless the package is over 100 pounds for which there is additional payment. There are also additional payments for COD's and a variety of special pickups and deliveries.

Mileage over 200 miles per day is compensated beginning at 25 cents per mile and increasing to 35 cents for mileage over 300 miles per day for vans only. Tractor-trailers and "spotted" trailers have a separate schedule. A special schedule of additional payment for substantial fuel increase is also provided.

The second part, "Contractor and Van Availability Settlement," is the daily payment for making a van (delivery truck) and driver available with enhanced payments on days before and after holidays. A "van availability" payment of $45 a day is paid for the principal vehicle in each service area regardless of stops, pickups or deliveries. No such

payment is made for supplemental vehicles. Thus drivers/contractors whose volume has increased to the extent that a supplemental vehicle is necessary have great incentive to have the Employer declare a second service area so that the driver/contractor can receive the second $45 payment each day. Various bonus "van availability" payments are made for days falling near holidays.

The third component, "Temporary Core Zone Density Settlement," requires one full page of the agreement to define. A particular complication is that a service area can have a number of different core zones. As the payments are by definition "temporary," they frequently change. A management official testified that core zone payments are based on a fairly sophisticated formula. He explained that the payment is a way of balancing out the fact that some of the work areas are very dense and very low mileage and hence the driver/contractor can deliver a large number of packages with minimal expense to the vehicle while other drivers/contractors deliver fewer packages in a much larger area and have higher costs. Core zone, he explained, is expected to drop as the area becomes more dense. Core zone was probably best described by one driver/contractor who testified that core zone pay is higher if the route is more spread out requiring greater mileage, but that he could not figure out how they get the numbers. Neither could any of the other drivers/contractors who testified. On the other hand, the record shows that cores zone density payments are frequently negotiated by the drivers/contractors, unlike other Employer payments which are generally unilaterally established.

The fourth component is "Flex Fee" which is described in Section 9 of the Agreement and discussed below.

The fifth component is the "Quarterly Performance Settlement" under which drivers/contractors with more than one year of service can receive payment if they have performed their contract obligations, i.e., actively operated. The payment is set at 2.25% of the quarter's gross not to exceed $2,000. This quarterly payment can be taken in cash or sent to an HR-10 plan (a retirement plan discussed below) or to a Service Guarantee Account (a type of savings account discussed below). Also, those with more than one year of service are eligible for a separate Service Bonus paid on the anniversary date of their first contract. The bonuses range from $500 for up to 5 years service to $1,500 for ten or more years. Unlike the quarterly payment, the bonus is only credited to the Service Guarantee Account, discussed below. One piece of supplemental equipment is also eligible for a Service Bonus which is not the case for the quarterly payment.

Supplemental payments are also made to drivers/contractors who use helpers. The payment is made after an individually established threshold of stops is reached, with different thresholds calling for payments of $15, $20, or $30. How these threshold figures are arrived at is not revealed by the record. Additional payments for spotted trailers and for special pickups and deliveries such as at railheads are also individually established and set out in an attachment to the settlement addendum. There is some indication that these special types of payments are subject to individual negotiation.

Section 4.2 of the Agreement, *Settlement Statements*, provides for the weekly issuance of checks based on settlement statements. It provides that the settlement statement will include an itemized listing of all deductions. These can be extensive as the Employer makes arrangement to deduct monies from drivers/contractors settlements to cover a wide

variety of payment from bills for tires to licenses fees. Notably Section 4.2 expressly states that the Employer:

> *. . . shall have no responsibility to make deductions for, or to pay wages, benefits, health, welfare and pension costs, withholding for income taxes, unemployment insurance premiums, payroll taxes, disability insurance premiums, social security taxes, or any other similar charges with respect to Contractor or Contractors' employees*.

There is no evidence that the Employer has ever made payments to employees or contractors of drivers/contractors through deduction from the settlement.

Section 5, *CONTRACTOR PRIMARY SERVICE AREA*, 5.1 *Definition*, of the Agreement, provides that the driver/contractor is responsible for daily pickup and delivery of packages in their Primary Service area as assigned to the contractor and shown in an addendum to the agreement. One management official testifying for the Employer explained that while the best practice is to fully describe the service area in the addendum to the driver/contractor's agreement, the practice of simply attaching a copy of the loading chart, a document prepared to show the loaders how to load each truck, has become commonplace. The record also revealed some agreements with the description completely missing. Further it appears that documentation of changes to service areas is not always incorporated in the addendum as contemplated by the Employer's upper management. Despite lack of documentation, drivers/contractors who testified were fully aware of the bounds of their service area or areas.

The size and configuration of a service area is determined by the Employer when it is first established. According to the Employer this determination is based on what can be done by a driver/contractor in a day and if there appears to be enough package volume and stops to

reach a settlement figure which would support a driver/contractor. Change in a service area's size or configuration is referred to as reconfiguration. Section 5.2, *Mutual Intention to Reduce Geographic Size of Primary Service Area*, of the Agreement, states the acknowledgement of the parties that as package volume in a service area increases, the size of a service area should decrease allowing for more efficient deliveries at less expense. This section also gives the Employer the right, with five days notice, to reconfigure a service area "to take account of customer service requirements." This language comes into play when the Employer decides that a driver/contractor cannot or is not fully servicing his area either because of growth of the area or a variety of other problems. The section states:

> *During such notice period, RPS shall give Contractor the opportunity, using means satisfactory to RPS, to continue to provide in such Primary Service Area the level of service called for in this Agreement. In event Contractor is not able to provide reasonable means to continue to service the Primary Service Area, RPS may in its sole discretion, reconfigure such area.*

Typically, well before the five day notice is given, various management officials and the driver/contractor involved have discussed the issue at great length and tried a number of alternative solutions without reaching mutual agreement. Drivers/contractors whose packages must continually be flexed off or who regularly bring back packages without having attempted to deliver them are constantly reminded by management that they are responsible to service their areas. It is the threat or possibility of reconfiguration which usually brings about action by the driver/contractor long before the actual notice. Drivers/contractors who wish to avoid reconfiguration may hire helpers, put on supplemental vehicles, buy trailers, change the order they run their routes, flex informally to other drivers/contractors or work harder or longer. Some drivers/contractors who cannot fully

service their areas attempt to sell part of their area or ask management to reconfigure. Others take the opposite tack and attempt to acquire parts of other areas and petition the Employer to have two separate service areas.

In areas with special problems, such as Bridgeville which has two peak seasons, management steps in more actively with special arrangements to handle increased business not due to permanent growth or change. But, where there is permanent growth or change, reconfiguration, as set out by the beginning of the section, is expected for the purpose of efficiency and reducing expense. The record is clear that when a level of expansion in business or change in business is reached so that a driver/contractor, despite his efforts (or because of a lack of effort) is unable to service his area to the Employer's satisfaction, the area is reconfigured by the Employer. The record also establishes that service areas are sometime reconfigured to add to the service area of a driver/contractor who because of efficiency or loss of major customers or the addition of supplemental equipment has excess capacity.

Contract termination rather than reconfiguration is used in cases where a driver/contractor is failing to provide service because of ineptitude, misconduct, absenteeism, discourtesy or any of a number of non-capacity related problems. Reconfiguration, on the other hand, is a regular anticipated feature of the agreement between the Employer and the driver/contractor. While not intended to be punitive, reconfiguration can cause loss of income to one driver/contractor while increasing that of another.

Section 5.3, *Recognition of Contractors' Proprietary Interest in Customers Served*, of the Agreement, states:

> *. . . this Agreement contemplates the recognition by both the parties hereto and by other contractors in the RPS system of a proprietary interest by Contractor in the customer accounts in his/her Primary Service Areas as that area is configured from time to time, and a consequent right to Contractor to receive payment in the event his/her Primary Service area is reconfigured with the result that customers previously served by the Contractor are reassigned*.

The section then provides that the Employer may deduct from the settlement of the driver/contractor gaining accounts and credit to the relinquishing driver/contractor amounts based on a seven part formula. The formula requires the calculation of the average number of daily pickups and deliveries gained or relinquished (based on a three month average) and the application of a dollar multiplier set out in an addendum on proprietary interest. The addendum provides multiplier figures of $1.00 per package delivery and $2.00 per package pickup. For example, if a driver/contractor loses an average of 20 pickups under the formula he is entitled to a *one time* payment of $40 from the gaining contractor. A $100 payment by the Employer is provided in the case of the loss of a spotted trailer assignment.

The formula payments have seldom been invoked. The Employer's witnesses testified that the payments were not automatic, that application had to be made for the payments. Few of the witnesses who are drivers/contractors were aware of these payment provisions and that the amounts payable were extremely small. Witnesses for the Employer testified that this payment system was, in effect, a fall back position, it being the Employer's preference that drivers/contractors would work out exchanges of parts of service areas between themselves making their own payment arrangements. The addendum devoted to proprietary interest states in this regard:

> *As Contractor's settlement and density increase in the Primary Service Area, the potential value of Contractor's customers may increase. Contractor may*

> *offer more than the minimum amounts prescribed above for packages being relinquished by another contractor, in order to gain additional customers and increase profitability, or the Contractor may sell to the highest bidder when Contractor's customers are being reassigned. RPS makes no guarantee of such increases, nor will RPS interfere in such transactions between Contractor and other persons who have the capability and qualifications to perform the services by this Agreement.*

There was some evidence in the record of drivers/contractors selling parts of their service areas to other drivers/contractors or giving them away. For example, at Bridgeville, driver/contractor John Spence sold a part of his route "the area in Berlin [MD] east of Route 113" to driver/contractor John Haney for $1,000. In the vast majority of cases it appears that the areas were reconfigured by the Employer and no payments were requested or made.

The sale of entire service areas, on the other hand, is clearly a frequent occurrence. Determining exactly how many such sales there have been and what prices the routes sold for is not possible. While RPS retains the right to approve the driver/contractor to whom a route is being transferred, it has no requirement that the price of the transfer be reported or if in fact a sale is the basis of the transfer. Further, in many instances, a vehicle is sold along with the route. Where there is a lease-purchase agreement the purchaser usually takes over the payment and the lease. In many instance the parties do not attempt to differentiate what part of the price is attributable to the route and what part to the vehicle and other equipment. When witnesses attempted to post facto state for the record what part of the sales price was for the route and what part was for the vehicle in these package sales, they could do little more than "guestimate." Even taking into consideration that many of the figures in the record are "guestimates," it is clear that in recent years a large number of routes have been sold for thousands of dollars over and above or separate from the value of any vehicles.

A number of drivers/contractors testified regarding route sales at Bridgeville. Jason Robert Coco in August 1998 bought the route he was driving for Michael Jackson from Jackson. Coco paid $20,000 for the route and a 1990 P-1000 van. The $20,000 included payments of $1,500 due on the van lease with Bush and $18,500 said to be for the route with no price put on the van at the time. Coco estimates that he could sell the van now for $8,000 and that considering the value of the van at the time he probably paid $9,000 for the route. Also at Bridgeville in the summer of 1996, John Haney assumed Glenn Williams' lease on a P-1000 and his contract with RPS for $7,500. Haney estimated that based on the equity in the vehicle the value of the route was at least $6,000.

Rick Spence is currently purchasing a route on an installment basis from Walter Stevenson, who sold the route to become the Bridgeville's swing driver/contractor. The purchase price is set at $6,500 with no vehicle involved in the transaction. As discussed previously, the contract with RPS is in the name of his brother driver/contractor Thomas Spence. Leon S. Rebuck, after four months of negotiations, purchased a route for $22,000 in July 1997 from Bridgeville driver/contractor Barry Stevens. The purchase included a paid up vehicle which Rebuck estimated was worth $12,000.

Additionally with the granting of Employer's Motion to reopen the record the Employer presented evidence by affidavit of several recent incidents of route sales at Bridgeville. In an affidavit, Bridgeville driver/contractor Travis Boardman stated that on February 14, 2000, he purchased the Cambridge service area from Eric Leatherbury for $7,000. According to Boardman, no vehicle was involved in the transaction. Boardman states that he has hired Matt West to drive the Cambridge area while he personally drives his

other route in Easton. Don Van Bourgondien states in an affidavit that he became a driver/contractor at Bridgeville after purchasing a route from Rena Frampton for $6,000 on January 31, 2000. To service the route he purchased a vehicle from Mark Galliano at the Patterson, New Jersey terminal. Similarly Milton Bruner states in an affidavit that he became a driver/contractor at Bridgeville after purchasing the Dover service area from Kevin Lloyd on February 15, 2000. According to his affidavit he paid Lloyd $19,000 for the area and a vehicle and estimates the fair market value of the vehicle to have been $3,000. Bruner also states in his affidavit that on February 25, 2000, he financed Steve Maag's purchase of the Rehobeth service area and a vehicle from Michael Jackson, estimating the value of the financing at between $17,000 and $18,000. He states that the fair market value of the vehicle was $4,000.

More than thirty drivers/contractors at locations other than Bridgeville testified that they had bought or sold routes for prices over and above the value of any vehicles involved. Their testimony showed a wide range in prices and a variety of sales arrangements. Some examples include San Antonio driver/contractor Michael Lee Ridings who purchased some bulk stops--one for $350, another for $400. Another driver/contractor at the Anaheim terminal, Bill Flores, testified that he purchased his route along with a straight truck and trailer for $40,000, about half of which he attributes to the cost of the service area and half to the vehicle cost.

The Employer, after being precluded from offering any more testimony in this regard, made an offer of proof that 140 witness would also testify to such sales. Further the Employer presented "summaries" of equity transactions for the years 1994 through 1999,

including information as to the sales price and, in some instances, information as to whether only part of an area was sold and whether or not a vehicle was included in the transaction and the price of the vehicle. These summaries show a large number of sales covering a wide range of sales prices. The 1999 summaries, for example, show approximately 100 sales of primary service areas for prices ranging from $500 to $60,000 with a substantial number of sales at $20,000 or more. While the transfer or sale of a service area has to be reported to the Employer so that the Employer can approve the purchaser as a driver/contractor there is no requirement that the Employer be provided with information on the sales price of the service area or any vehicle or whether in fact the transfer was the result of the sale. Thus these summaries, which were prepared by terminal and management on the basis of information gleaned from a variety of sources, are admittedly subject to error regarding the amounts of money involved; however, the prices are consistent with the testimony of the many drivers/contractors who testified.

Section 6, *CONTRACTOR CUSTOMER SERVICE (CCS) PAYMENTS*, of the Agreement, provides for bonuses. They are paid to drivers/contractors who achieve individual customer service and safety goals and whose terminals achieve service goals "all as determined by RPS." The details of the program are spelled out in an addendum to the Agreement. Payments can be put into service guarantee account, or weekly settlement or retirement account.

The top payment for achieving individual service and safety goals each month is $260 for those with more than five years service, less to those with less service. Bonuses are available for each vehicle a driver/contractor has had in service for over a year. Thus the

amount of money at stake can be considerable. Customer complaints are a frequent cause of loss of CCS. Terminal managers investigate complaints and report to the Employer's Customer Service department which processes the report to the Contractor Relations department. If at that level the Employer determines that a complaint is valid, no CCS payment is awarded to the involved. Accidents are also a cause for loss of CCS and are similarly investigated.

A $50 bonus is payable each month to those drivers/contractors who have not missed pickups. Additionally, payments based on the level of the terminal's performance are paid to all drivers/contractors when a terminal achieves its performance goals for the month. These bonuses range up to $99 for those with more than five years of service.

CCS payments are distinct from the Service bonuses described above and are directly tied to terminal performance. If the terminal does not meet its "local inbound service goal" (99% of the packages delivered the same day they arrive at the terminal), CCS is not paid at that terminal. Bridgeville, as discussed above, has had difficulties with reaching that goal.

Section 7, BUSINESS SUPPORT PACKAGE, of the Agreement, provides for a theoretically elective package of goods and services. The package includes uniforms, the scanner and related equipment, vehicle inspections, vehicle washing and discounts which RPS has negotiated with various vendors for items such as tires and batteries at a cost of $8.00 per day per vehicle. Many drivers/contractors who subscribe to the package do not utilize many of its features. Some, for example, get back to the terminal too late for washes. Others complain the uniforms have too much starch or for other reasons prefer purchasing their own which RPS facilitates by providing information on suppliers of approved uniform

items. Almost all drivers/contractors, however, subscribe to the Business Support Package because of the difficulty in purchasing and servicing the necessary scanner and related equipment on the open market as noted above.

Effective June 1999, RPS added an optional "Time-Off Program" to the business support package. For an additional $3.00 per day per vehicle RPS will supply a replacement driver and vehicle to cover the driver/contractor's route for two weeks per year. The driver/contractor on vacation receives no settlement for his route under the Time-Off Program. Thus many drivers/contractors hire temps to drive their own vehicles when they take time off rather than participating in the program. Also not all terminals have a swing driver/contractor. At some terminals, groups of drivers/contractors have worked out their own programs for shared vacation and relief drivers separate and apart from the RPS Time-Off program.

The replacement drivers are known as the "swing" or vacation relief drivers and have separate contracts with no proprietary interest. Typically swing drivers/contractors have previously driven routes. Many currently have contracts for routes as well as swing contracts. The settlement for swing drivers/contractors is the same as for route contractors/drivers except that the swing contractor/driver is paid $1.25 per pickup or delivery stop rather than $1.00 and $60 van availability rather than $45. Further payment are made of $125 per day plus $60 van availability seven weeks per year representing 1.5 days of familiarization rides for each of the 22 routes he will cover.

At Bridgeville before the Time-Off Program went into effect drivers/contractors were able to schedule temps in advance for vacations, but since the program went into effect some

drivers/contractors complain that the terminal management has not continued to be as accommodating about assisting with arrangements for temps to do vacation relief forcing them into the program.

Walter Stevenson became the Bridgeville swing driver/contractor with the inception of the program. Before becoming the swing driver/contractor he had a contract for a route. Currently he is in the process of selling the route to Rick Spence (discussed above) who is paying him on an installment basis. According to Stevenson, the route will revert to him if the installments are not paid.

Section 8, *SERVICE GUARANTEE PROGRAM*, of the Agreement, allows drivers/contractors to accumulate funds in an interest bearing account. RPS makes quarterly contributions to accounts based on the balance--$100 for balances of $500 or more, $150 for balances of $750 or more and $200 for balance of $1,000 or more. Service Bonuses, discussed above, are credited to the Service Guarantee Account. While the stated purpose of the section is the accumulation of funds for maintenance and substitute drivers, the contractor/driver may withdraw funds from the account at any time for any purpose. The Service Guarantee Program also provides for loans to drivers/contractors to fund maintenance, made at RPS's discretion. The amount of funds available for loan is tied to the driver/contractor's balance in his service guarantee account. Interest is charged and the loans must be repaid in one year. RPS does not offer start up loans as it had in the past.

The *FLEX PROGRAM*, described in Section 9 of the Agreement, was introduced with the 1994 basic agreement. A "flex fee" of $7.50 per day is paid to drivers/contractors who have elected to participate in the Flex Program. Under the Flex Program, participating

drivers/contractors handle stops outside of their primary service areas. If they have elected the Flex Program, they receive the payment each day whether or not they are flexed any packages. If they are flexed packages, they receive the regular stop and package rate for the packages in addition to the flex payment. Drivers/contractors, whether or not they are in the flex program, frequently make private deals with drivers/contractors in adjacent work areas regarding the exchange of packages. The driver/contractor who actually picks up or delivers a package receives the package and stop settlement payment regardless of whose area the packages belongs to.

The effects of participating in the program vary widely. Some drivers/contractors regularly collect their daily $7.50 without getting any flexes. Some drivers/contractors testified that they sought every possible flexed package to increase their income and put on additional equipment to capture this additional business. Others testified to being overburdened by too many flexed packages on certain occasions.

Almost all of the drivers/contractors at Bridgeville participate in the flex program. The Agreement clearly provides that the program is elective; however, some drivers/contractors at Bridgeville testified that they felt pressured to participate in the program based on a misunderstanding of its nature as discussed above.

The flexed packages come from drivers/contractors who are temporarily over capacity. A driver/contractor can tell the dispatcher not to flex packages off his truck even if he appears to be over capacity. This request will be honored unless the driver/contractor is in the opinion of terminal management not servicing his area. The drivers/contractors at

Bridgeville did not appear to have concerns in this regard, but rather were concerned that excess capacity was not being flexed off their routes.

Section 10, *HR 10 Plan*, of the Agreement, provides for a driver/contractor funded elective retirement plan. "HR 10" stands for "House Resolution 10" and refers to a special type of retirement plan for small businessmen.

Section 11, *TERM OF AGREEMENT*, allows the driver/contractor to elect a one, two, or three year term for the Agreement. It also provides for automatic renewal for one year terms absent 30 day notice by the driver/contractor. Prior to the 1994 revision, agreements did not have limitations on terminations.

The current Agreement at Section 12, *TERMINATION PROVISIONS*, lists a number of other eventualities causing termination. Some of these include misconduct, reckless, or willful negligent operation of equipment, failure to perform contractual obligation by either party, and terminal closing or decline in business. Terminations of contractors have been caused by assaults, sexual misconduct towards a customer, driving while intoxicated or without a license. There was no evidence of termination without cause.

Drivers/contractors on a number of occasions simply do not show up or "walk away" from their routes. RPS considers this to be termination without 30 days notice which under this section calls for liquidated damages of $1,000.

RPS has an internal procedure for appealing terminations. Additionally this section provides for arbitration of termination by the American Arbitration Association. It precludes lawsuits based on matter subject to arbitration. While the arbitration clause is quite lengthy it appears to only be applicable to matters related to termination.

Sections 13 through 17, of the Agreement, include various savings and technical clauses. Section 18, *ASSIGNMENT*, of the Agreement, provides that RPS may assign its rights under the Agreement to an affiliate. A driver/contractor may assign his to a replacement driver/contractor "acceptable to RPS as being qualified to provide the services under this agreement." The section also provides that RPS at its discretion may as an accommodation to the driver/contractor, arrange to collect consideration paid by the replacement to the driver/contractor by deduction from the replacement's settlement.

P & D drivers/contractors may enter into multiple agreements. As discussed above at Bridgeville, there are two P & D drivers/contractors who each have two contracted routes. A number of drivers/contractors from throughout the system testified that they have contracts for two, three and four separate routes. The Employer offered to prove that there were even instance of contractors with five separate contracted routes.

The *LINEHAUL CONTRACTOR OPERATING AGREEMENT*, as noted above, is similar to the P & D Agreement. The line haul agreement, however, does not have a section similar to Section 5 of the P & D Agreement, *Contractor Primary Service Area* or other recognition of a proprietary interest. The payments to line haulers are substantially different from P & D payment. Line haul settlements cover spotted trailers, mileage, drop-in hooks and many other payment arrangements.

Line haulers wear the same uniform as P & D drivers/contractors. Some drivers/contractors use their equipment for line haul at night and P & D during the day. Some line haulers shuttle from a terminal to another terminal without going to a hub. At some terminals line haulers and P & D contractors make pickups at the same location on the

same day. Line haulers pull 28 or 45 foot trailers and, depending on state law, can haul one or two at a time. The DOT imposes varying requirements on line haulers (and all drivers) based on size of the equipment. Most line haul operators have multiple units. They determine what equipment they need and purchase or lease it and can use their equipment for non-RPS purposes.

Allen Loudon is Bridgeville's only line haul driver/contractor. He is signatory to a Line Haul agreement and has a P & D addendum. He hauls between Bridgeville and the Harrisburg terminal and does local pickups, spotted trailers, occasional pickups and deliveries. Currently he operates four tractor trailers with five drivers for RPS. Loudon himself drives only a couple of times a month. He hires drivers after checking the driving records of applicants through his insurance company.

For hauling RPS pays Loudon 84 cents per mile with standard mileage set for each of his delivery locations. Loudon is paid $15 for trailer drops and pickups. He also receives bonuses for safety. Loudon in turn pays his drivers flat rates which differ depending on how long the driver has been with him. He also provides his drivers with vacation, holidays and health insurance and retirement benefits.

In addition to his RPS tractor-trailers and drivers Loudon has five employees driving car hauling equipment at his company Auto Express Transport Incorporated and three more drivers hauling building supplies at another one of his companies, Loudon Trucking. He sometimes uses two of his RPS drivers for Loudon Trucking work.

P & D drivers/contractors have little opportunity to interact with Loudon other than to see or greet him or his drivers once or twice a week. Interaction between P & D drivers, however, are not much more extensive.

Forming corporations has become very common for RPS drivers/contractors. According to the Employer at least 1,300 of its P & D drivers/contractors and a substantial number of its line haul drivers/contractors have formed corporations. The full number is not known. RPS learns of the incorporation when a driver/contractor asks the terminal manager to change the settlement to the new corporate name; however, not all incorporated drivers/contractors take their settlement in the name of the corporation. For example, George Page, a driver/contractor at the Buffalo terminal explained that he is incorporated as Page Delivery, Incorporated, but his settlement comes in his name. Some contractors go back and forth between corporations and individual status. A large number of incorporated drivers/contractors testified regarding their corporation and the Employer offered to present many others who would similarly testify.

At Bridgeville, Leon S. Rebuck, is the only P & D contractor/driver who has incorporated. On the other hand, Alan Loudon, the line haul driver/contractor at Bridgeville, explained that he operates his business hauling for RPS as a sole proprietorship, but also has two corporations, Loudon Trucking Incorporated and Auto Express Transport Company which perform other work.

Conclusion

The Employer argues that since the Board last addressed its situation in *Roadway III*, supra, it has made a number of significant changes in its relationship with its drivers/contractors, which has now resolved any question regarding the independent contractor relationship between the Employer and its drivers/contractors. The Petitioner contends that the relationship between the Employer and the drivers/contractors remains essentially the same as the employee relationship found by the Board in its three previous *Roadway* decisions. Petitioner's arguments do not overcome the mass of evidence submitted by RPS which establishes that the relationship between RPS and the drivers/contractors is no longer that of employer and employee.

In support of its position Petitioner argues that the drivers/contractors cannot negotiate any changes to the basic operating Agreement and are forced to sign it as is. In fact Petitioner goes so far as to say that the Agreement has almost all the characteristics of an adhesion contract. Petitioner argues that many drivers/contractors simply want a job and sign what they are presented. As Petitioner points out, many drivers/contractors may not read or understand the Agreement, but there is no evidence that any were coerced to sign it. Clearly there is a disparity of bargaining power between the parties to the Agreement, but such disparity does not necessarily tend to make the drivers/contractors employees. Large concerns inherently have more bargaining power than individuals and use these powers when dealing with other businesses including independent contractors.

Petitioner argues that while the Agreement purports to create an independent contractor relationship and states at one clause that the manner and means are at the

discretion of the driver/contractor, other terms of the Agreement allow the Employer to exercise constant control over the manner and means. One specific agreement term pointed to by Petitioner is the requirement that the driver/contractor be solely responsible for vehicle maintenance. How requiring the driver/contractor to pay for maintenance of his own vehicle's maintenance tends to make him an employee is not clear. Rather it appears that this term of the Agreement tends to show independent contractor status. Next the Petitioner argues that the escrow deposit requirement somehow tends to show employee status, but why this should be so is also not clear.

The Agreement term which gives RPS the power to determine a vehicle's suitability, pointed to by Petitioner, does tend to show some control of the manner and means of performance by the Employer. The related requirement that vehicles be painted white and have the RPS logo is also pointed to by the Petitioner. The color and logo involve some control by the Employer, but do not necessarily point to employee status. As the Employer argued, the display of logos is commonplace in franchisees and independent dealers.

Petitioner argues that the term of the Agreement giving the Employer the right to reconfigure the primary service area after five days written notice shows employee status. It should be noted, however, that because of the nature of the business, change is inevitable and the Agreement indeed states that it contemplates growth of customer base. If the geographical description of a service area were to remain unchanged the expected outcome is that the amount of pickups and deliveries would change because of the expected increase in business. The fact that the Employer retains the discretion and the control in relation to how these changes are handled is really more of an argument against a finding of proprietary

interest rather than a direct argument for employee status. Having a proprietary interest in an area that is subject to unilateral change is definitely not the same as having a proprietary interest in an immutable area. The record, however, shows that, subject to change or not, the service areas are bought and sold.

Petitioner also points out that the Employer's Safe Driving addendum to the agreement contains some provisions which are not mandated by DOT regulations. The Employer, Petitioner notes, bars anyone from driving who has any record of positive test results for drugs or alcohol while the DOT does not impose a lifetime bar and the Employer allows a record of fewer accidents than the DOT would find a bar to driving. That a business does not want to deal with someone who has tested positive for drugs or alcohol or who has a record of frequent accidents does not tend to establish an employee relationship for those who do not have such records and with whom the entity therefor chooses to do business. The Petitioner also points out that if a driver/contractor wishes to transfer his route to another or even hire a replacement driver they must also meet these stricter criteria, but the same reasoning applies. If Wal-Mart (frequently used as an example throughout the hearing) were to insist on RPS having accident-free or drug and alcohol-free drivers before agreeing to do business with RPS it would no way imply an employer-employee relationship between the two businesses.

Petitioner argues that the Employer critiques drivers in ride along or observation rides sometimes making file notes of whether they are safe drivers or if the van is dirty and gives instructions to the drivers/contractors on how to perform their duties. The Agreement provides for these observations to verify that service standards are being complied with. The

record is clear that the drivers/contractors feel free to and generally ignore what most consider gratuitous suggestions by the observers. That RPS wants to be sure that its customers are getting good service by observing and taking notes on the service twice a year does not establish employee status.

Another argument of Petitioner's is that the Employer frequently threatens termination of agreements when drivers/contractors engage in such conduct as failing to deliver to remote areas, regularly returning with packages or driving in excess of hours allowed by DOT regulations even when the drivers/contractors have legitimate reasons for such conduct. This is actually an argument that tends to point to contractor rather than employee status. With a contract a business seeks the ultimate result and the contractor's reasons for failure, even if legitimate, are largely irrelevant. As was referenced in the record, many UPS customers moved their delivery business to RPS while the UPS drivers were on strike. These customers did not care if UPS had a good reason for failing to make deliveries. They canceled their agreements with UPS because it could not deliver the packages.

Petitioner also points to the necessity of subscribing to the business support package. This package is theoretically optional under the Agreement, but it is virtually mandatory because it is realistically the only practical way to obtain a scanner. While this arrangement may be somewhat unfair to those who do not want to purchase truck washes or rent starched uniforms just so they can get a scanner, it does not tend to show employee status. Compelling individuals to buy or rent services and equipment to do business with an entity is more of an indication of contractor status. Employees generally do not pay their employers to have their trucks washed.

The Petitioner argues that the Employer's day-to-day control over packages flexed from or to a driver/contractor under the Agreement is indicative of employee status. The Agreement provides that on any day where the volume of packages for the service area exceeds the volume that "contractor can reasonably be expected to handle" a portion of the packages may be reassigned. This gives the Employer extremely wide latitude. This is particularly so because the packages are sorted in middle of the night when the drivers/contractors are not around to consult on which if any packages should be moved from their routes. It is clear from the record that many drivers/contractors cure this problem by having supplemental equipment and drivers available to handle all possible volume. Thus potential Employer control of excess can be avoided by hiring employees and buying equipment. Further, while a driver/contractor who signs the flex program addendum allows the Employer to decide which packages to flex to him, this addendum is optional. Some drivers/contractors (and possibly managers) in Bridgeville were confused about the flex program and thought drivers/contractors had to sign up to have packages flexed to them and in order to have excess volume flexed from them. The Agreement and addendum, however, are clear that this is not the case.

The core zone payment is also pointed to by the Petitioner as a way the Employer evens out earnings. The record evidence shows that while RPS may initially come up with the core zone payment figures by unknown methods, drivers/contractors can and do negotiate their core zone payments.

Petitioner argues that the Board's distinctions between the situation in *Roadway III,* 326 NLRB 842 (1998) where it found employee status and the situation in *Dial-a-Mattress*,

326 NLRB 884 (1998) where it found the drivers to be independent contractors are still valid. *Dial-a-Mattress* was decided concurrently with *Roadway III.* In distinguishing the situation before it in *Dial-a-Mattress* the Board stated:

> *Unlike here, Roadway provides its drivers with a vast array of support plans to reduce risk in the performance of their deliveries and pickups for Roadway. The amount of income for the Roadway drivers is based, inter alia, on a "guaranteed" van availability settlement and a temporary core zone settlement determined by Roadway's estimate of what is a "normal" level of packages and pick-up and deliveries for the drivers. The Roadway drivers' pay is also curtailed by the operation of Roadway's "flex" program where overflow work in a driver's service area is transferred to other drivers. Thus, the elements of Roadway's compensation plan, in effect, result in both minimum guarantees and effective ceilings for its drivers.* Dial-A-Mattress, supra, at 893.

These distinctions and a number of others pointed to by the Board remain the same. The drivers/contractors still wear uniforms and have the Employer's logo on their equipment still painted RPS white. The Employer still regularly reconfigures service areas. Drivers/contractors have only limited control over flexing. The business support package is still virtually the only way to obtain and service compulsory electronic equipment. Their hours are still somewhat dictated by the time of the arrival of the packages from the hub and the hours dictated by many customers. Core zone payments are still made to balance incomes across zones, though there is now evidence that core zone rates are negotiated on some occasions.

But the Board in *Dial-a-Mattress* went on in drawing distinctions from *Roadway III*:

> *. . . Roadway provides its drivers with assistance in acquiring new or leased custom designed specialty vans through its arrangement and promotion of the Navistar vans distributed by Bush Leasing. Roadway also eases its drivers' burden of obtaining a used vehicle from former*

> *Roadway drivers. To meet these initial vehicle costs, Roadway offers a start-up loan to its new drivers.* Dial-a-Mattress, supra at 893.

RPS no longer provides assistance (other than information) in acquiring vehicles and does not make start-up loans. Most significantly the Board in *Dial-a-Mattress* pointed out "[t]he Roadway drivers do not use multiple trucks or hire helpers or drivers to allow them to pursue other business ventures and opportunities." *Dial-a-Mattress*, supra at 893. This is certainly no longer the case at RPS.

There have been substantial changes in the Employer's operations and its relationship with its drivers/contractors since *Roadway III*. At the time of *Roadway III* there were 317 terminals and hubs. The number has increased so that currently RPS has approximately 352 terminals and 18 hubs. There are now approximately 7,000 drivers/contractors including P & D and line haul, up from 5,000 at the time of the last decision.

Two indicators of entrepreneurship which the Board found lacking in the facts in *Roadway III* were business incorporation and use of vehicles for non-RPS work. Incorporation is now common throughout the system as is both commercial and non-commercial outside use of vehicles. At least 1,300 of its P & D contractors/drivers now operate as corporations as opposed to the approximate 6% incorporated at the time of *Roadway III.* The Bridgeville facility which is the subject of the instant petition has one P & D driver/contractor who has formed a corporation.

Unlike in *Roadway III,* there is now evidence that many RPS drivers/contractors, possibly half, use their vehicles for commercial purposes unrelated to RPS, though none at Bridgeville do so. Petitioner argues that many of the outside businesses which

drivers/contractors testified to were minor sidelines and that the vast majority do not have the time to devote to any other businesses. Petitioner points to *C.C. Eastern, Inc. v. NLRB*, 60 F. 3d 855 (D.C. Cir. 1995) where the court agreed with the Board's argument that if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the Company's claim that the workers are independent contractors. The court denied enforcement of the Board's decision in *C.S. Eastern*, 309 NLRB 1070 (1992), finding that the Board had misapplied the principal in that case even though the record included only one instance of a driver hiring someone else to haul freight using his tractor. Here the record is clear that drivers/contractors can realistically take advantage of a myriad of entrepreneurial possibilities either driving their own vehicles after completing their RPS work or by hiring other drivers and in some cases maintaining a small fleet of vehicles and drivers hired to drive them unlike the facts in *C.S. Eastern*, supra.

Drivers/contractors now acquire vehicles and equipment from a number of sources other than Bush Leasing. At the time of *Roadway III* Bush had been virtually the only source of vehicles for drivers/contractors who acquired them either directly from Bush or second-hand from other drivers/contractors who had earlier acquired the vehicle from Bush. Further, RPS has discontinued its policy of offering start-up loans which had been used to help with down payments on vehicles and other costs, a factor considered in *Roadway III.*

The Board in *Roadway III* found that decisions to flex were controlled by the Employer on the basis of set minimums and maximum ranges. Now drivers/contractors have more control over flexes and can successfully request that apparent excess volume not be

flexed away from them unless they are not servicing their area, admittedly a management assessment.

Unlike in *Roadway III*, which found that drivers/contractors could not determine not to show up to work on any given day, drivers/contractors now can and do regularly hire temporary replacements or become absentee contractors such as John Haney at Bridgeville who has hired a driver to cover his service area. Drivers/contractors hire helpers to lighten their work and shorten their day. More significantly there is substantial evidence of drivers with multiple routes who hire (or contract with) individuals to drive their second, third and fourth routes or the many supplemental but not fully contracted routes.

In *Roadway III* the Board found little evidence (and virtually none of it first-hand) that drivers/contractors had bought and sold service areas or parts of service areas. On the other hand the record in the instant case is replete with evidence that drivers/contractors regularly make such purchases and sales and that large amounts of money frequently change hands. Further, the Employer attempted to present additional evidence in this regard, but was precluded from doing so.

Petitioner points to the Board's recent decision in *Douglas Foods Corp*., 330 NLRB No. 124 (2000), finding that factors tending to show employee status outweighed those tending to show independent contractor status. There lease route operators owned the food they sold and kept daily profits, received no credit for wasted food and bore the risk of theft from their trucks. The company did not withhold taxes, paid no vacation and had no time clock. On the other hand the company assigned stops, adding and subtracting customers, set the prices for food sales, and supplied the food to the lease operators. The Board in *Douglas*

did not actually weigh these and other factors. Rather the parties had stipulated that the lease route operators were employees which stipulation was reviewed by the administrative law judge. The Board simply noted that the administrative law judge's finding was not inconsistent with *Roadway III* and *Dial-a-Mattress. Douglas Foods Corp.*, slip op. at 1, fn 2.

Petitioner points to *R. W. Bozel Transfer, Inc.*, 304 NLRB 200 (1991), where the Board overruled the Regional Director and found owner-operators to be employees, arguing that the facts found there are very similar to the situation at RPS. The Board in *Bozel* noted the Regional Director's reliance on the fact that owner-operators owned their own vehicles, were not provided a minimum income or any benefits, and hired their own assistants to load and unload were outweighed by the fact that Bozel exercised pervasive day-to-day control over the owner-operators similar to that which it exercised over its employee-drivers. The Board in overturning the Regional Director's decision, found that owner-operators were assigned to pre-determined runs, could not refuse assignments and hauled exclusively for Bozel. Unlike at RPS, the Board found that Bozel arranged the schedule of deliveries which the owner-operators could not deviate from and disciplined owner-operators in the same manner it disciplined employee-drivers. Further the loaders were hired four or five times a month from among individuals who hung out at the docks and their fee was sometimes partially paid by Bozel. While these arrangements are similar to the casual arrangements for "jumpers" at RPS, it is substantially different from the more formal and sometimes permanent hiring of drivers by the RPS drivers/contractors.

Also cited by Petitioner is *Rediehs Interstate, Inc.*, 255 NLRB 1073 (1980), where the Board found owner-operators to be employees rather than independent contractors. The

Board included in the unit only single unit owner-operators and operators employed by single unit owners but not multiple unit owner-operators. While in some respects the *Rediehs* situation is similar to that at RPS, particularly with respect to strict driver experience and safety requirements, there are significant differences. The agreement which the owner-operators entered into with Rediehs had the stated intent of creating an independent contractor relationship, but the Board found that in practice the relationship differed from that set out in the contract. The employer paid license fees and fines for the owner-operators as well as part of their medical insurance premiums, unlike RPS. Finally the Board noted that the term of employment was essentially indefinite or "at will," while the RPS agreements are for definite terms.

Similarly in *Standard Oil Company*, 230 NLRB 967 (1997), cited by the Petitioner, the Board found owner-distributors to be employees rather than independent contractors despite an agreement purporting to make them independent businessmen. The Board noted that the proprietary interest in their trucks was limited in that the company could terminate a contract without cause on 30 days notice and required that the company be given first option to buy the truck. The owner-distributors had no proprietary interest in their routes and were expressly prohibited from assigning their rights. Thus there are substantial differences in the facts found in *Standard Oil* from those in the instant case.

Amber Delivery Service, Inc., 250 NLRB 63 (1980) enf. in part 651 F.2d 57 (1st Cir 1981), cited by Petitioner, is also distinguishable. The package delivery drivers of Amber were found by the Board and the court to be employees rather than independent contractors. While there are some similarities between the control exercised by Amber and the control

exercised by RPS, the Amber drivers did not possess any proprietary interest in their delivery routes and the Amber drivers were occasionally paid an hourly wage for loading work, both substantial differences from the situation at RPS.

RPS notes in its brief that the Union attempted to make much of the fact that RPS requires drivers hired by drivers/contractors as well as the drivers/contractors themselves to meet certain qualifications and pass background checks. RPS points out that these are merely methods of insuring compliance with DOT and ICC requirements. RPS argues in its brief, citing *Diamond L. Transportation, Inc.*, 310 NLRB 830 (1993) and the cases cited therein, that the Board does not consider company controls imposed by government regulation by such bodies as the ICC and DOT when assessing the control an employer asserts over individuals alleged to be employees under the common law "right of control test." The same argument applies to other RPS controls such as log requirements, logos, safety requirements, minimum age, accident reports, maintenance reports, insurance and health certifications. RPS requirements on these points flow from or are directly mandated by government regulation.

As pointed out by Petitioner, in *Roadway III*, the Board noted that the Supreme Court in *NLRB v. United Insurance*, supra, had stated that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" in determining whether individuals are employees or independent contractors. *Roadway III*, supra at 850. In *Austin Tuppler Trucking*, 261 NLRB 183 (1982), cited by the Employer, the Board found that the owner-operators who controlled the manor and means by which their hauls were accomplished were not employees. But the Board noted in reaching that result that:

> *Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case that in the other.* Id at 184.

In its brief RPS points out that when the Board revisited the question of whether the drivers/contractors were employees or contractors in *Roadway III*, supra, the record before the Board included only one year of operation under the 1994 revised Operating Agreement. Thus, RPS points out, the Board was looking at a "skeletal" record when it made the factual finding on which it concluded the drivers/contractors were employees. With the current record, RPS argues, the very same factors cited by the Board in *Roadway III* favoring employee status now point to independent contractor status. In *Roadway III*, the Board found no significant entrepreneurial opportunity for gain or loss, on substantial proprietary interest beyond truck ownership, minimal risk because of support from RPS, no outside business pursuits, no functional independence or separate identity. RPS argues that it has now presented sufficient facts related to these factors to show that the drivers/contractors at Bridgeville, and throughout the system, are independent contractors. RPS drivers/contractors contract for multiple routes, buy and sell their routes, hire in drivers and helpers to assist them and/or replace them. They buy or lease their vehicles and equipment from a variety of sources without loans or substantial assistance from RPS. Many engage in outside business pursuits. Drivers/contractors bear all maintenance and fuel expenses including the risks of major equipment failure. Many incorporate themselves.

The Employer has demonstrated substantial changes in the facts found by the Board in *Roadway III* where the Board found employees status. These changes clearly outweigh

facts that have remained the same. As the Board has repeatedly noted no one factor or set of factors can be dispositive of this complex issue. Thus no one factor here is dispositive. Viewing the facts demonstrated by this record as a whole, however, clearly shows that RPS's P & D drivers/contractors and the swing driver/contractor are, like the *Dial-a-Mattress* owner-operators, independent contractors.

In conclusion I find that the P & D drivers/contractors and the swing driver/contractor sought to be represented by Petitioner at RPS's Bridgeville terminal, the only facility at issue here, are not employees within the meaning of Section 2(3) of the Act. Accordingly, the petition is dismissed.

Motions to Correct the Record

After the close of the hearing Petitioner filed with the undersigned a Motion to Correct the record noting that the record contains errors of transcription and inadvertent typographical and spelling errors. The Employer filed a response to Petitioner's Motion along with its own Supplemental Motion agreeing with certain of the proposed changes, disputing other alleged errors or proposed changes and proposing various alternatives and additional corrections. Petitioner then filed a Response to RPS's Motion to Correct the Record indicating its position on the disputed corrections and additional proposed changes. To the extent that the proposed corrections are unopposed they are granted.

177-2484-5000; 177-2484-5067-2000